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Nos. 02-241 and 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME AND BRIEF OF MTV NETWORKS IN SUPPORT OF RESPONDENTS

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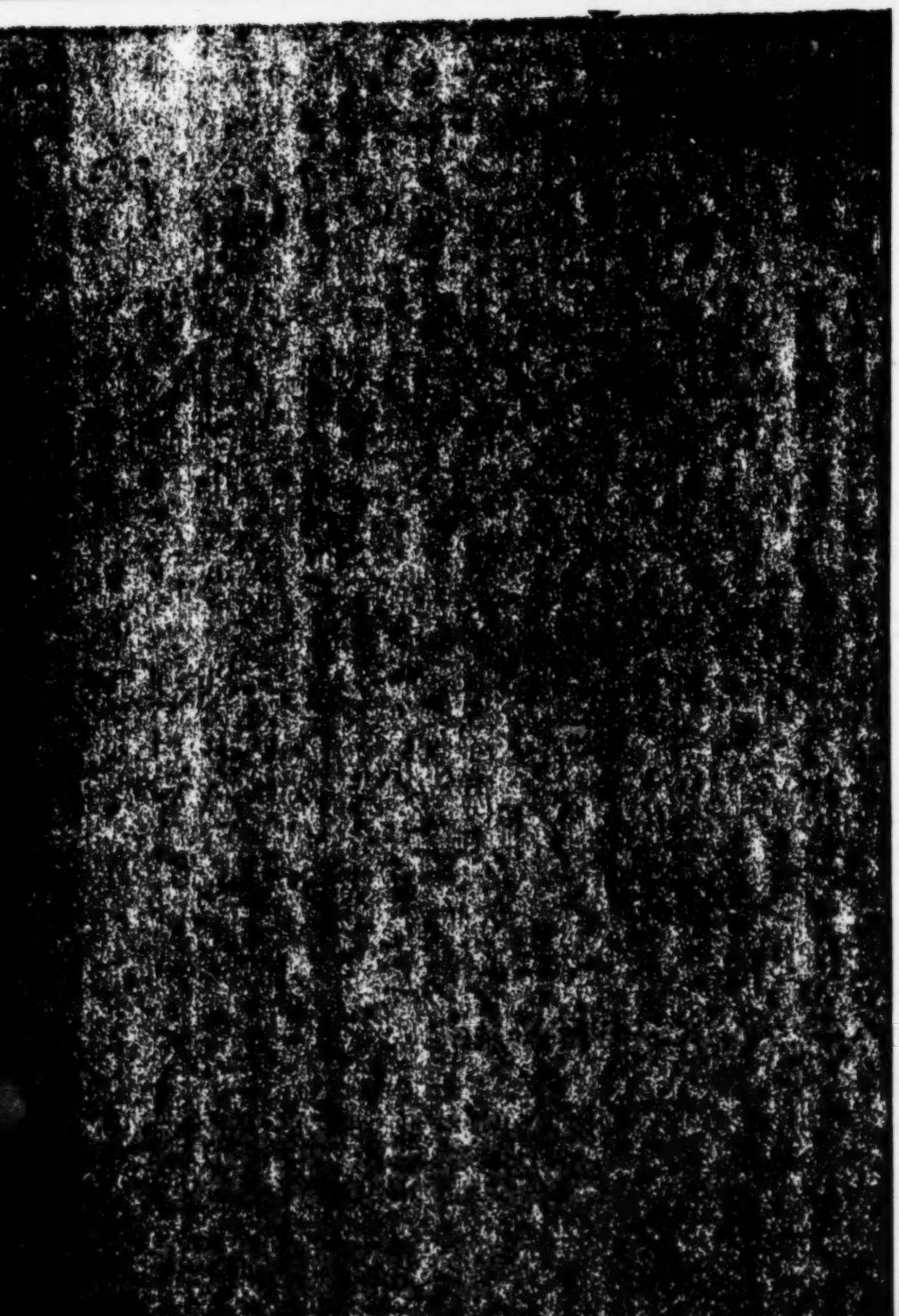

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

MTV Networks, by its counsel and pursuant to Rule 37, moves for leave to file out of time *amicus curiae* brief in support of Respondents in these cases. As a multinational entertainment company contributing ideas to the marketplace that shape the attitudes of millions of viewers in its global and domestic audiences, MTV Networks has an interest in these cases that has not been adequately addressed by other *amici*.

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STATEMENT OF INTEREST[1]

MTV Networks (MTVN), a division of Viacom International, is the world's most-watched group of television networks, reaching 384 million households around the globe. MTVN is composed of MTV: Music Television (MTV); MTV2; VH1: Music First; Nickelodeon; TNN (The National Network); CMT (Country Music Television); and others. MTVN television networks are seen in 164 countries and 18 languages, via locally programmed and operated TV channels and websites. The MTV International brands include MTV Asia, MTV Australia, MTV Brasil, MTV Europe, MTV Latin America, and MTV Russia, all of which combine MTV's overall style with local cultural tastes and musical talent. The company's varied holdings also include interests in television syndication, publishing, home video, radio, recorded music, licensing and merchandising, and two feature film divisions—MTV Films and Nickelodeon Movies.

MTVN has grown, and its programming has been so successful largely because of the company's commitment to creating and maintaining an inclusive work environment that reflects the make-up of its domestic and global audience. MTVN has established Diversity Goals as well as Global Diversity/Inclusion Councils to help organize and achieve recruiting and retention goals. For example, MTVN annually participates in a Minority Workshop and Multicultural Advertising Internship Program, and also recruits at schools with traditionally large populations of minority students,

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[1] Under Rule 37.3(a) of the Rules of the Court, the parties lodged letters consenting generally to the filing of briefs of *amici curiae*. Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part and that no one other than *amicus*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

such as Howard University. MTVN's diversity goals nurture a company culture that is diverse and inclusive. This, in turn, keeps MTVN creatively vibrant and also a first choice for employees, consumers, and outside partners from both the creative and business communities.

MTVN's interest in this case is substantial. In the past two years, for example, MTVN has recruited recent graduates and hired interns from more than 100 public colleges and universities throughout the nation. MTVN hires graduates, laterals, and interns for a wide variety of positions, including, to name a few, jobs in animation, business development, communications, creative services, editorial, finance, human resources, law, marketing, national advertising sales, production, programming, and talent and artist relations. MTVN's current postings include internship opportunities in Miami, Florida at Nickelodeon and MTV Latin America—a 24-hour Spanish-language network. MTVN depends on the nation's top universities not only to foster cross-cultural competencies that will influence the quality of workplace interactions, but also to produce diverse and well-trained graduates to lead the development of MTVN's eclectic and multi-cultural programming. Such diverse programming will continue to shape attitudes and perspectives in the global marketplace of ideas, as it has done since MTV's inception.

SUMMARY OF THE ARGUMENT

MTVN wants to hire the best and brightest to shape the development of its multi-cultural and creative programming and other business initiatives. As a major supplier in the uninhibited marketplace of ideas, diversity in the nation's universities—which are the feeder pools to American businesses—is vital for at least three reasons. First, well-educated employees with diverse backgrounds are essential to the continual innovation necessary for the survival of eclectic television programming. Second, a

diverse workforce is critical to the development and marketing of programming targeted to specific racial and cultural communities as well as developing a robust environment for other business initiatives. Third, to build and retain a diverse workforce that is so necessary to success, MTVN depends on universities to teach cross-cultural competencies and foster an environment where those competencies can be practiced regularly.

ARGUMENT

I. A Diverse Workforce Is Essential For Producing Eclectic Programming That Feeds The Marketplace Of Ideas.

A. MTVN Is A Substantial Contributor To The Marketplace Of Ideas.

MTVN is a major supplier in the "uninhibited marketplace of ideas." *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90 (1969). Since its debut in August 1981, MTV has become a worldwide pop culture phenomenon that shapes how domestic and international audiences view their world. *See, e.g.*, LAWRENCE GROSSBERG, MTV: SWINGING ON THE (POSTMODERN) STAR, in CULTURAL POLITICS IN CONTEMPORARY AMERICA 254, 265 (Ian Angus & Sut Jhally eds., 1989) (MTV is the paradigmatic postmodern art form, refusing to take anything seriously, including itself); Doris Estelle Long, *"Democratizing" Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT'L & COMP. L. 217, 233 (2002) ("[a]t the heart of present-day globalization" are "cultural icons of Western consumerism" such as "CNN, McDonald's, Mickey Mouse, and MTV," which "have arguably become among the most potent icons of a global consumer culture"); *Sino-U.S. Relations In The 21st Century*, 6 J. INT'L L. & PRAC. 229, 285 (1997) ("The

fax machine and MTV are probably the greatest proponents of human rights in China today.").

MTV's effectiveness in cultivating alternative view points and dismantling societal stereotypes and biases should not be underestimated. *See* James Bernard, *A Newcomer Abroad, Rap Speaks Up*, N.Y. TIMES, Aug. 23, 1992, sect. 2 ("From small clubs in Moscow to the favelas of Rio de Janeiro to MTV in Tokyo, rap has begun to elbow its way onto the world's stage....[I]ncreasingly, rappers in other countries are using [the music of American rappers] to reflect on and grapple with their own local realities, adding their own flavor to an American art form."); LISA A. LEWIS, GENDER, POLITICS, AND MTV: VOICING THE DIFFERENCE 223-24 (1990) (describing how women musicians used "MTV and music video" as "a site for social struggle over gender oppression in the 1980s"); Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 421 (2002) (the year 2000 was marked by the "Latin Music Craze," in which Latina/o artists became the darlings of MTV and U.S. mass media); Steven W. Bender, *Will the Wolf Survive?: Latino/a Pop Music in the Cultural Mainstream*, 78 DENV. U. L. REV. 719, 744 (2001) ("In identifying positive attributes of the LatPop explosion, what stands out is the status of these Latino/as as role models, particularly for youth. Given the invisibility of Latino/as in America, these artists have also emerged as a source of cultural pride for Puertorriqueno/as and other Latino/as....Moreover, the English fluency of LatPop artists helps to dispel the impression that Latino/as are unwilling or unable to learn English."); George S. Peek, *Recent Legislation: Where Are We Going With Federal Hate Crimes Legislation? Congress and the Politics of Sexual Orientation*, 85 MARQ. L. REV. 537, 572 (2001) (noting that, in January

2000, MTV suspended its regular programming to air, commercial free, hate crime victims' names and stories).

The criticisms that have been lodged against MTV over the past 20 years underscore its vital need for capable decision makers that are receptive to creative movements in different cultures and are open-minded to new trends as well as criticisms. *E.g.*, Dick Hebdige, *What is Soul?*, in VIDEO ICONS AND VALUES 121-33 (Alan Olson, Christopher Parr & Debra Parr eds., 1991) (discussing the absence of African-American rap from MTV in the 1980s).

MTV's ability to shape attitudes and reach new audiences has transformed it into a powerful platform for political figures. *E.g.*, Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J.L. & POL. 459, 460 (1996) (noting Bill Clinton's appearance at an MTV "town hall meeting" before the 1992 Democratic National Convention where he opined on the kind of judge he would like to appoint); Iqbal Z. Quadir, *A New Era of Development? The Bottleneck is at the Top of the Bottle*, 26-FALL FLETCHER F. WORLD AFF. 69, 85 (2002) (noting that after September 11, U.S. Secretary of State Colin Powell used MTV as a platform from which to reach 350 million young people worldwide); David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 624-26 (2001) (discussing Vice-President Gore's appearance on MTV during the 2000 Presidential campaign, in which he supported "civil unions" of same-sex couples).

B. A Well-Trained Workforce With A Diverse Background Is Essential To The Innovation Of Eclectic Programming.

In the practical experience of MTVN, the need for diversity in higher education—which feeds its workforce is

compelling. A well-educated and savvy workforce with a diverse background and perspective is absolutely essential to the development of the unique brands of MTVN and other entertainment media. MTVN's goal is to *create* popular culture—not merely reflect it—through the development of programming that challenges convention and resonates with MTVN's highly diverse audiences.[2] The continual innovation required for success in the industry depends on heterogeneity in MTV's creative work-teams. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovation Ideal*, 84 CAL. L. REV. 953, 1024 (1996) [*hereinafter* Sturm & Guinier, *Reclaiming The Innovation Ideal*] ("Studies have shown that work-team heterogeneity promotes more critical strategic analysis, creativity, innovation, and high-quality decisions. Recent mathematical work suggests that participation of groups with different prior beliefs or predispositions in decision making improves the quality of the decision for everyone.") (citing, *e.g.*, L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Homogeneous and Heterogeneous Groups*, 62 J. ABNORMAL & SOC. PSYCHOL. 401 (1961); Sumita Raghuram & Raghu Garud, *The Vicious and Virtuous Facets of Workforce Diversity*, *in* SELECTED RESEARCH ON WORK TEAM DIVERSITY 155, 156 (Marian N. Ruderman et al. eds., 1995) (finding that heterogeneous teams bring multiple perspectives to tasks and thereby outperform homogeneous teams in generating ideas)).

In addition to innovation, MTVN's programming and other creative-driven initiatives require an understanding of

[2] For a company developing intangible creative brands—like MTV and VH1—diversity in the workforce is arguably even more essential than for multi-national companies producing standard products like cars, computers, or pharmaceuticals.

the racially and culturally diverse audiences that MTVN serves. Cultural communities constitute distinctive market niches. Sturm & Guinier, *Reclaiming The Innovation Ideal*, 84 CAL. L. REV. at 1025. MTV and other American companies have sought to address these niches by diversifying their workforces. This is not an espousal of the view that Hispanics or African-Americans should be recruited as "spokespersons" for their "cultures" or "races." An Hispanic director may not be essential to producing successful "Hispanic" programming; an African American talent scout may not have been needed to recognize the artistic value of rap music. But it cannot be doubted that membership in a racial or ethnic minority in this society entails experiences and perspectives that would be valuable to the entertainment industry. It seems self-evident that a person from a Puerto Rican community, who speaks Spanish, and grew up listening to Puerto Rican-influenced music likely will add value to the process of developing authentic programming and effective marketing to the "Latin" niche. *Cf.* Steven W. Bender, *Will the Wolf Survive?: Latino/a Pop Music in the Cultural Mainstream*, 78 DENV. U. L. REV. 719, 730 (2001) ("Marc Anthony has complained that while he is often represented in the media as a 'hot jalapeno,' as a Puerto Rican he has never tasted one."); *see also* Media Cos. Br. at 5-10. Moreover, minority employees can add fresh perspectives to themes marketed primarily to majority cultures.[3] It seems equally obvious that greater diversity in

[3] *See* Marsha Scarbrough, *Recipe for Soul Food: Combine writers from sitcom, drama, and cinema. Mix thoroughly.*, WRITTEN BY, Apr. 2001, *available at* http://www.wga.org/aboutwriters_index.html (quoting Charles D. Holland, co-executive producer of television show *Soul Food*) ("There is no reason why you can't have minorities running shows, and those shows don't have to be about minorities. ...I think minorities have interesting points of view about the world anyway because minorities are already outsiders."); Sharon Johnson, *Behind Closed Doors, Roundtable:*

television programming will, in turn, affect how millions of Americans see their world.

C. To Build And Retain Diverse Workforces, MTVN Depends On Universities To Teach Cross-Cultural Competencies.

To meet the challenge of retaining a diverse workforce and fostering the innovative atmosphere that is so essential to MTVN's success, managers and employees increasingly must understand people from diverse backgrounds. They must be skilled in recognizing and addressing interracial and multicultural issues. The pitfalls of employing managers without these skills have been detailed by other *amici*, with whom MTVN fully concurs. *See* GM Br. at 11-18; 65 Leading Am. Businesses Br. at 5-10 Like other businesses, MTVN depends on universities to teach cross-cultural competencies and foster an environment where those competencies can be practiced regularly.

A diminution in diversity at public universities would mean that many graduates would leave their homogeneous cocoons for the first time when they enter the workplace. At the University of Michigan Law School, for example, evidence in the Grutter litigation indicated that if the school could not consider race, minority students would have dropped to only 16 (or 4%) of the entering class of 400

Where Do We Go From Here? Black Writers in the New Millennium, WRITTEN BY, December 1999/January 2000, *available at* http://www.wga.org/ aboutwriters_ index.html [hereinafter *Black Writers Roundtable*] (quoting filmmaker Carole Oligario) ("I think that black writers, when they're good, are more qualified to write different kinds of people because we live in two worlds all the time. We live in our own world and we're living in the bigger world, and we know how the various racists think and feel because we have to interact with them. Whereas the Caucasian persuasion, oftentimes, can isolate themselves. We have not been able to.").

students compared to the actual enrollment of 58 (or 14.5%). With only 16 minority students, the opportunity for meaningful interaction with the other 384 students would be slim. *See* Br. Resp. No. 02-241 at 6 n.7. The upshot is that graduates will arrive in the workplace ill-equipped to do their jobs. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 n.48 (1978) (opinion of Powell, J.) (students surrounded "only by the likes of themselves" are likely to hold parochial and limited perspectives). And employers, in turn, are ill-equipped to alter behaviors and perceptions accumulated over a lifetime. *Cf.* Ellen Neuborne, *Sex harassment suits soar Complaints high from women in blue-collar jobs*, USA TODAY, May 3, 1996, at 1A (quoting an industrial psychologist who opined that most corporate training programs are still in their infancy and are not sufficient to undo a lifetime of behavior and social experience).

MTVN's unique mix of eclectic shows and edgy attitude was invented—and is being reinvented daily—by the most dynamic and eclectic people in the industry. This unique mix, in turn, is feeding the marketplace of ideas and shaping national and global attitudes. The future of American business and the quality of message communicated through the media "depends upon leaders trained through wide exposure to the ideas and mores" as diverse as the nation's people. *See Bakke*, 438 U.S. at 313 (opinion of Powell, J.). The nation's universities thus have a compelling interest in taking effective steps to produce both highly-trained and diverse workforces with cross-cultural competencies. Such workforces are critical for the creative success of influential broadcast entertainment companies like MTVN.

CONCLUSION

For these reasons, the Court should hold that diversity in higher education is a compelling government interest, and the University of Michigan's admissions programs are narrowly tailored to serve this compelling interest.

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